Supreme Court, U.S.
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No. 90-1952

In The

Supreme Court of the United States

October Term, 1990

ALAN W. FINI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. (A) Whether in a criminal prosecution the federal government's use of evidence seized by state authorities in a state criminal investigation in knowing and intentional contravention of state constitutional and statutory provisions violates due process.

(B) Whether certiorari should be granted to allow this Court to resolve the conflict among the Circuits regarding the admissibility of evidence illegally seized by state law enforcement and then handed to federal authorities in contravention of the "silver platter doctrine."

2. Whether in a criminal prosecution, comity, appropriate use of the supervisory authority of the federal courts, or an appropriate deference to the rights of citizens under their state constitutions requires the federal government to defer to a state's heightened protection of its own citizens' fundamental privacy rights.

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No.

In The

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ALAN W. FINI,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner Alan W. Fini respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on March 26, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit affirming the conviction of Alan W. Fini is reported at *United States v. Sutherland*, 929 F.2d 765 (1st Cir. 1991) and is attached as Appendix A (1a).[1] The order of the United States

1. Dianne Sutherland was a co-defendant in this case. The First Circuit's opinion was issued jointly as to Ms. Sutherland and Mr. Fini. Henry J. Fini, the third codefendant at trial, was acquitted.

District Court for the District of Massachusetts is contained within the trial transcript and was not reported. The judgment is attached as Appendix B (31a) and the order is attached as Appendix C (33a).

The opinion of the Supreme Judicial Court of Massachusetts in *Commonwealth v. Fini* is reported at 403 Mass. 567, 531 N.E. 2d 270 (1988), and is attached as Appendix D (35a). The issues presented herein were raised in the appeal to the United States Court of Appeals for the First Circuit after having been litigated at the trial level in the United States District Court for the District of Massachusetts.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on March 26, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The jurisdiction of the United States District Court for the District of Massachusetts was based on criminal charges against Mr. Fini brought pursuant to 21 U.S.C. §§ 841(a)(1) and 846, and 26 U.S.C. § 7201.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous, crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in

> jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution, Section One, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

Article 14 of the Massachusetts Declaration of Rights provides:

> Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all of his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search,

arrest. or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

STATEMENT OF THE CASE

A. Introduction

This is a petition for a writ of certiorari to the United States Court of Appeals for the First Circuit with respect to its decision which affirmed the convictions of Alan Fini. Those convictions were for conspiracy to distribute cocaine and marijuana; distribution of cocaine (three counts); distribution of marijuana (one count); and two counts of income tax evasion.

B. Facts Regarding Mr. Fini's Prosecution

Although the federal indictment against Alan Fini was returned on November 1, 1989,[2] the case actually began three and a half years earlier — on January 29, 1985 — when the Westfield, Massachusetts police arrested an individual named Gary Forish on drug charges.

The Westfield Police turned the investigation and prosecution over to "state troopers assigned to the Hampden County Massachusetts District Attorney's Narcotics Drug Squad (also known as the Task Force)." The Task Force discussed with Forish "his not being charged with . . . a felony under Massachusetts law," and Forish agreed to cooperate with the state authorities. Forish's primary responsibility under his agreement with the state police was to act as an undercover informant with Alan Fini. In compliance with this agreement, Forish met with Mr. Fini

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2. There was a superseding indictment returned on June 11, 1990 (A20), which made a very minor change to the indictment, not germane to this petition.

approximately twenty times between May 1, 1985 and June 13, 1986. Each time Forish met with Fini he wore a body wire which allowed the state police to tape record the conversations. Those tape recordings were showcased as the central evidence against Mr. Fini at his federal trial.

In his opening, the prosecutor said:

> Unlike many cases, ladies and gentlemen, the evidence in this case won't be limited to physical exhibits and the testimony of witnesses. Because you will have the opportunity to hear evidence that comes from the mouths of the Defendants themselves. Because every time that Gary Forish walked in to meet with Alan Fini, he was wearing a body wire.
>
> And as a result, we have recorded conversations that will allow you to hear for yourselves exactly what was said . . .
>
> That is powerful evidence, ladies and gentlemen, because you will hear Alan Fini himself, among other things, talk about the quality of his product, the type of his cocaine.
>
> You will hear him talk about some of the precautions that he claims to take to avoid detection.
>
> You will hear him talk about keeping the Lamborghini out of state. You will hear him talk about his safe house, or as he sometimes referred to it, as his stash joint.

> And at one point, he says, and I quote ladies and gentlemen, listen for this on the tapes. "I am going to get some legal dough [so that] I can drive [the Lamborghini] safely." Ladies and gentlemen, those are powerful statements, and those tapes are powerful evidence, and you will have the luxury in this case of hearing the Defendants confirm for you what you have been told by other witnesses and what you've seen in the way of physical exhibits.

Monitoring the conversation between Fini and Forish and garnering the tapes was the responsibility of State Police Corporal Thomas Guilmet. The state police arranged for and recorded each conversation. The state police also instructed Forish before, and debriefed him after, each conversation with Fini. After Forish's conversations with Fini were finished, Guilmet would remove the tapes from the cassette player and place them in an evidence bag. The original tapes were then maintained and transcribed at the District Attorney's office. DEA was supplied with a courtesy copy.

By February, 1986 the Task Force had received four confirmations from the Massachusetts State Police laboratory that the substances which Fini had allegedly sold to Forish were cocaine.

The Commonwealth of Massachusetts, armed with Forish's testimony, the corroboration of the police who overheard the conversations between Fini and Forish, and the lab analyses, thus was prepared to prosecute. On July 14-18, 1986, the Hampden County District Attorney presented the case against Alan Fini to the Hampden County Grand Jury.

On July 18, 1986, the state grand jury indicted Mr. Fini for trafficking in cocaine, unlawful distribution of cocaine, unlawful distribution of marijuana, conspiracy to traffic in cocaine, and conspiracy to distribute marijuana.

The Commonwealth knew that the tapes could not be used as part of its case-in-chief. The one-party-authorized electronic surveillance violates both a Massachusetts statute, M.G.L. C. 272, § 99, and the Massachusetts' Declaration of Rights. *Commonwealth v. Blood,* 400 Mass. 61, 507 N.E. 2d 1029 (1987).

After indictment however, the Commonwealth took the position that perhaps the tapes could be used as potential impeachment should Mr. Fini testify. The Commonwealth accordingly filed a motion *in limine* for a pre-trial determination that the tapes could be used for that limited purpose. That issue in its pre-trial status went to the Massachusetts Supreme Judicial Court, which ruled:

> The Commonwealth may not use the recorded conversations for impeachment purposes irrespective of whether the conversations dealt with collateral matters or directly with the crimes charged. Of course, as in *Commonwealth v. Blood, supra,* the informant himself may testify to the conversations.

Commonwealth v. Fini, 403 Mass. 567, 573, 531 N.E. 2d 570 (1988) (41a).

Shortly after the Supreme Judicial Court's decision, on September 5, 1989, the prosecution filed a *nolle prosequi* "for the reason that the interests of justice require[d] such filing at this time." On November 1, 1989 the federal grand jury returned the instant indictment.

Prior to trial, Mr. Fini's counsel objected to the introduction of any of the tape-recorded conversations between Forish and Fini. The basis for the objection was that the electronic surveillance violated state law, and state law governed admissibility of the

tapes in the federal trial. The objection was overruled, as follows:

> MR. FINI'S COUNSEL: With respect to [Mr. Fini] . . . the case came originally from the State investigation in which there were undercover tapes made which [the government] plans to play . . . . These tapes were made in violation of laws of the State of Massachusetts . . .
>
> THE COURT: Federal law and State law differ on that.
>
> MR. FINI'S COUNSEL: I would like to have a continuing objection to the tapes on due process grounds, on the basis that this was a . . . State investigation for State purposes, which has now been taken over by the Federal authorities for purposes of prosecution in Federal Court . . . . That's my objection and with the court's permission we will not stand to object each time the tapes are played.
>
> THE COURT: Very well [33a].

The tapes were admitted, and Mr. Fini was convicted. Following his conviction, he timely appealed to the Court of Appeals for the First Circuit. A primary ground for the appeal was the District Court's ruling that federal rather than state law governed the admissibility of the tapes. On appeal, the District Court's ruling was affirmed, and Mr. Fini's convictions were upheld.

The Circuit Court of Appeals' decision in the part of the decision relevant to this petition, stated:

> Appellants contend that the tape recordings should

have been suppressed because they were obtained by state law enforcement personnel in violation of Massachusetts law. We begin with the proposition that federal law governs federal prosecutions in federal court. *Elkins v. United States*, 364 U.S. 206, 223 (1960) (other citations omitted).

To support their position appellants point to our decisions in *United States v. Pratt*, 913 F.2d 982 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 681 (1991), and *United States v. Jarabek*, 726 F.2d 889 (1st Cir. 1984). These cases suggest the following possible exception to the general rule: If state law enforcement officers, acting without federal involvement and in knowing violation of state law, gather evidence which is inadmissible in state court but admissible in federal court, the federal court should not condone the use of such evidence because to do so would permit federal officials to "allow[ ] illegally seized evidence to be handed them on a 'silver platter.' " *Pratt*, 913 F.2d at 986 (quoting *United States v. Auidi*, 835 F.2d 943, 946 (1st Cir. 1987), *cert. denied*, 485 U.S. 978 (1988)); *see also Jarabek*, 726 F.2d at 900 n.10.

We could conclude simply that because the investigation in this case was not *purely* a state creature, it falls within the general rule that the admissibility of evidence obtained during a joint federal-state investigation for use in a federal criminal trial is governed by federal law." *Pratt*, 913 F.2d at 987 (citing *Jarabek*, 726 F.2d at 900).[1] This rule applies even where, as here, the state initially sought to use the evidence in a state

prosecution. *See Jarabek*, 716 F.2d at 896-97. Thus, we could limit our holding to the narrow facts of this case; however, we choose to go further.

More fundamentally and more broadly, we wish to curb speculation as to a "silver platter" exception stemming from our dicta in Pratt and *Jarabek . . . . We write here to clarify that, in this circuit, there is no such exception.* We prefer this approach to forcing courts into intricate analytical maneuvers to escape a poorly conceived exception.

In sum, we hold that in federal criminal prosecutions the admissibility of wiretap evidence is a question of federal law.

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1. The Massachusetts wiretap statute itself exempts *federal law enforcement officers from* its provisions provided that they are "acting pursuant to authority of the laws of the United States and within the scope of their authority." M.G.L.c. 272. §99(D)(1)(c) (footnote in case) (emphasis added).

United States v. Sutherland, supra, 765 F.2d at 769-771 (emphasis added).

Certiorari is sought in order to have this Court resolve the apparent conflict among the Circuits regarding the silver platter doctrine and the use by federal authorities of evidence that was seized by state law enforcement officers in a state investigation in knowing and intentional violation of state statutory constitutional provisions.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals miscast the issue as an evidentiary one and came to a decision which conflicts with decisions of the Courts of Appeals for the Second, Fourth and Ninth Circuits.

A. Introduction

The central issue presented is whether the federal courts, as a matter of due process, comity, or appropriate deference to principles of federalism, should defer to a state's more stringent privacy protections when evidence is seized by state law enforcement officials in a state investigation in intentional violation of state constitutional protections.

State constitutions may provide, and states may legislatively adopt, privacy protections more stringent than federal constitutional guarantees. Massachusetts' constitutional eavesdropping protections are broader than the Fourth Amendment's. *Commonwealth v. Blood,* 400 Mass. 61, 67, 74, 507 N.E. 2d 1029 (1987) (warrantless electronic surveillance with one-party consent lies beyond the protective reach of the Fourth Amendment, but violates Article Fourteen of the Massachusetts Declaration of Rights). Massachusetts statutes also provide heightened privacy protections against eavesdropping, broader than the federal statutory protections. *Commonwealth v. Jarabek,* 384 Mass. 293, 294-300, 424 N.E. 2d 491 (1981).

Massachusetts' interest in providing heightened privacy protections to its citizens is of paramount constitutional importance. *Commonwealth v. Blood,* 400 Mass. 61, 69-75, 507 N.E. 2d 1029 (1987). That state interest is undermined, however, by the federal government, when, as here, evidence obtained by

state officials in a state investigation for use in state court, garnered in violation of a state citizen's privacy rights is then handed over to federal officials on a silver platter for use in a federal prosecution.

The Court of Appeals approached the case from the general proposition that federal law applies in federal court. While the general proposition is true, it does not apply here.

The tension between the state and federal sovereigns is clear. However, resolution of this issue in favor of the rights of citizens under the "respective state constitutions is consistent with *Elkins v. United States,* 463 U.S. 206 (1960), and advances — not undermines — principles of federalism. If a state's heightened privacy protections are not to be at constant risk of being rendered meaningless at the whim of federal prosecutors, then state law must be the yardstick when the evidence at issue is seized by state officials as part of a state investigation.

Contrary to the First Circuit's opinion, the issue here is not an evidentiary issue resolved by *Elkins v. United States,* 364 U.S. 206 (1960). *Elkins* merely held that evidence seized by state officials in violation of the United States Constitution is subject to the federal exclusionary rule. In *Elkins* evidence was obtained by state officers in a search that would have violated that defendant's Fourth Amendment protections if it were conducted by federal officers.

In stark contrast, the search here did not violate federal constitutional provisions. It violated state constitutional provisions. *Elkins* did not address the question raised here, namely, whether state constitutional considerations — already decided by the highest state court in the same case — restrict the admission of the identical evidence in a federal prosecution.

The Circuit Court's opinion unfortunately acts as an invitation to unlawful conduct which cloaks that unlawful conduct with the imprimatur of the federal judiciary. When a state has granted its citzens constitutional protections, the federal courts may not unravel those protections in the guise of a rule of evidence.[3]

B. The Decision Below Conflicts With the Decided Law in the Second Circuit, Where State Law Would Have Governed.

United States v. Sotomayer, 592 F.2d 1219, 1225 (2nd Cir. 1979), *cert. denied,* 442 U.S. 919 (1979) held that when a state offical conducted an illegal wire interception in violation of the state law on eavesdropping which was more stringent than federal law, the state's limitations apply in determining the admissibility of the wiretap evidence — even when the case is prosecuted in federal court.

Sotomayer presented the Second Circuit with the issue posed here, which is "whether the admissibility into evidence of . . . wiretap interceptions in [the] federal prosecution [was] governed by state or federal law." That court held that, in "determining whether to admit a wiretap obtained by a state officer acting under a state court order issued pursuant to a state statute, [it was bound to] apply . . . those more stringent state statutory requirements or standards that [were] designed to protect an individual's right of privacy." *Id.* at 1225.

The violation in *Sotomayer* was that the tapes were not sealed in accordance with state law. The tapes were admissible under

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3. In *United States v. Pratt,* 913 F.2d 982, *cert. denied,* ____ U.S. ____, 112 L. Ed. 2d 673 (1990) and *United States v. Jarabek,* 376 F.2d 89 (1st Cir. 1984), the First Circuit clearly had indicated that the federal government could not sit back and allow illegally state-seized evidence to be handed to it on a silver platter for use in a federal prosecution.

federal law. The Second Circuit characterized the violation of state law as a technical one that did not implicate the defendant's privacy rights. Accordingly, it allowed the tapes to be admitted into evidence.

The court noted however, that more stringent state standards designed to protect an individual's right of privacy would require the suppression of evidence obtained in violation of the standards. The

> failure to respect [the state's] more stringent protection of privacy rights would not only violate principles of federalism, but encourage state and local officials to by-pass state law and to engage in federal forum-shopping of tainted evidence.

United States v. Sotomayer, supra, 592 F.2d at 1225. Thus, the taint of illegally seized evidence in the Second Circuit is not cured when set out on a silver platter for delivery to the federal government for use in a federal prosecution. Application of *Sotomayer* here would have required suppression of the tape recordings. Indeed, the First Circuit recognized this but contended that *Sotomayer* had been discarded by the Second Circuit. We respectfully disagree. We submit that an analysis of the cases in the Second Circuit cited by the Court of Appeals in the decision here show that *Sotomayer* — and the silver platter doctrine it enunciated — is viable and established law in the Second Circuit. We invite the Court's attention to those cases.[4] Accordingly, a

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4. *United States v. Lilla,* 699 F.2d 99 (2nd Cir. 1984) (evidence from state-run wiretap investigation that was conducted in violation of the subject's privacy rights found inadmissible under federal or state law; where state requirements are designed to protect privacy interests, the failure to comply with the more stringent state requirements renders the evidence inadmissible in a federal prosecution); *United States v. Aiello,* 771 F.2d 621, 627 (2nd Cir. 1985) (we

(Cont'd)

grant of certiorari is appropriate to resolve the conflicts between the First and Second Circuits regarding the application of state constitutional protections designed to protect an individual's privacy rights.

C. The Decision Below Also Conflicts With the Law in the Fourth Circuit, Where State Law Would Have Governed Admissibility of the Tapes.

In *United States v. Apple*, 915 F.2d 899, 908-909 (4th Cir. 1990) the United States Court of Appeals for the Fourth Circuit applied state law to determine the admissibility in a federal prosecution of a wiretap interception and the fruits of that wiretap.

(Cont'd)
are governed by our own decisions to the effect that although federal law normally controls the admissibility of evidence in federal criminal trials, we will apply more stringent state statutory requirements with respect to wiretap requirements that are designed to protect an individual's right of privacy); *United States v. Spadaccino*, 800 F.2d 292, 296-297 (2nd Cir. 1986) (the exclusion of evidence obtained in violation of a substantive provision of a state statute designed to protect an individual's right of privacy where the state courts would exclude the evidence [might be proper] even though the state provision is stricter than corresponding federal law); *United States v. Pforzheimer*, 826 F.2d 200, 202-204 (2nd Cir. 1987) (in the interest of comity, court applied federal law rather than deciding unsettled question of Vermont constitutional law); *United States v. Eyerman*, 660 F. Supp. 775, 780 (S.D.N.Y. 1987) (upon analysis of *Sotomayer*, it is clear that such considerations are at the heart of the issue before this court. The concerns of federalism are most implicated when the state has exercised its resources, either by conducting an investigation or by authorizing a wiretap order. Where a state has demonstrated its emphasis on privacy in enacting a stringent wiretap statute, it would ill serve the concerns of federalism for a federal court to allow state officials to flaunt that law by making cases in federal court with evidence that their state legislature had deemed tainted); *United States v. Regan*, 706 F. Supp. 1102, 1108 (S.D.N.Y. 1989) (*Sotomaker* rule intended to prevent state officials from flaunting state law by making cases in federal court based on evidence inadmissible in state court).

The First Circuit's ruling here — that state law does not apply — is in conflict with *Apple*.

The defendant in *Apple* made a prima facie showing that she was an aggrieved party under 18 U.S.C. § 3504(a)(1) on the ground that she was a party to telephone conversations illegally intercepted by Virginia authorities. *United States v. Apple,* 915 F.2d at 907. The defendant argued that the Virginia wiretap was illegal because the state authorities failed to exhaust other investigative means before seeking the wiretap, and because the affidavits submitted in support of the wiretap order were insufficient under federal and state law. *Id.* at 908-909.

The Fourth Circuit noted that Virginia and federal law were identical in requiring that the application for a court wiretap order include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear unlikely to succeed if tried or to be too dangerous." *United States v. Apple,* 915 F.2d at 908-909, n. 17.

The court held that the defendant's claim that she was the subject of an illegal wiretap could be denied "only upon the government's showing that the Virginia wiretap was not illegal or that the state authorities did not intercept any of her communications." *United States v. Apple,* 915 F.2d at 909. The court upheld the defendant's claim that "federal law requires that a state-authorized wiretap conform to federal *and* applicable state law." *Id.* (emphasis added).

Application of *Apple* to the instant case would have allowed the tapes to be admitted at Mr. Fini's trial only upon a finding that such admission was proper under federal *and* state law. The Massachusetts Constitution clearly precludes introduction of such evidence. Accordingly, this Court should grant certiorari to resolve the conflict between the First and Fourth Circuits regarding

whether state law designed to protect an individual's privacy rights must be applied.

D. The Decision Below Also Conflicts With the Law as It Has Been Decided by the Court of Appeals for the Ninth Circuit.

The Court of Appeals for the Ninth Circuit has decided that the admission of evidence, admitted in violation of state law, constitutes a denial of due process when, as here, that evidence is a substantial part of the prosecution's case. *McGuire v. Estelle*, 902 F.2d 749, 755 (9th Cir.), *cert. granted*, ____ U.S. ____, 112 L. Ed. 2d 1177 (1991). The First Circuit's ruling — that admission of the wiretap recordings in Alan Fini's trial did not require reversal of his conviction — is in conflict with that decision.

The *McGuire* court applied state law in reversing the defendant's conviction of second degree murder. The court found that the admission of evidence of prior injuries to the victim was improper as a matter of state law. *McGuire v. Estelle*, 902 F.2d at 754. It also found that a jury instruction that permitted the direct determination of guilt from the prior injuries was wrong under state law. *McGuire v. Estelle*, 902 F.2d at 755. The severity of the error in *McGuire* rendered the defendant's trial fundamentally unfair and a violation of due process. *Id.*

Application here of the law as enunciated by the Ninth Circuit would have required exclusion of the tape recordings. The admission of the tapes, in violation of Massachusetts constitutional protections, was error severe enough to render Mr. Fini's trial fundamentally unfair according to the Ninth Circuit's analysis in *McGuire*.

Consequently, this Court should grant certiorari to resolve the conflicts between the First and the Ninth Circuit regarding

whether the admission of evidence in this case violated due process.[5]

5. As a procedural matter we note that bringing a federal case based on evidence which was seized by state officials illegally is an important decision which reflects upon the courts and their process. The due process violation is heightened where, as here, that decision is subject to no process. *See, for example, Sedima S.P.R.L. v. Imrex, Co.*, 473 U.S. 479, 503 (1985) (Marshall, J. dissenting on other grounds) ("[I]n seeking a broad interpretation of RICO from this court in *United States v. Turkette*, 452 U.S. 576 (1981) the government stressed that no 'extreme cases' would be brought because the Justice Department would exercise 'sound discretion' through a centralized review process (citation omitted)."). Here, there apparently is no review or process of any sort for determining when the federal government will take the tainted evidence from the state authorities on a silver platter.

CONCLUSION

The law of the First Circuit stands in conflict with the law as it has been determined by the Courts of Appeals of the Second, Fourth and Ninth Circuits. Certiorari should be granted to resolve the conflict. Where fundamental constitutional rights such as privacy are concerned, judicial rules should not be formulated, nor should cases be decided, on the fortuity of which federal circuit or state court is home to the prosecution.

For all of the foregoing reasons, this Honorable Court should grant this petition for certiorari and order full briefing and argument.

Respectfully submitted,

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APPENDIX A — OPINION OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT IN *UNITED STATES v. SUTHERLAND* AND *UNITED STATES v. FINI*, 929 F.2d 765 (1ST CIR. 1991)

UNITED STATES of America,

Appellee,

v.

DIANNE SUTHERLAND,

Defendant,Appellant.

UNITED STATES of America,

Appellee,

v.

ALAN W. FINI,

Defendant, Appellant.

United States Court of Appeals,
First Circuit.

Heard Jan. 9, 1991.
Decided March 26, 1991.

Wendy Sibbison, Greenfield, Mass., for defendant, appellant Dianne Sutherland.

Appendix A

William C. Newman, with whom Lesser, Newman, Souweine & Nasser, Northhampton, Mass., was on brief, for defendant, appellant Alan W. Fini.

C. Jeffrey Kinder, Asst. U.S. Atty., Wilbraham, Mass., with whom Wayne A. Budd, U.S. Atty., Boston, Mass., and Kevin J. Cloherty, Sp. Atty., U.S. Dept. of Justice, Washington, D.C., were on brief, for appellee.

Before BREYER, Chief Judge, ALDRICH and TORRUELLA, Circuit Judges.

TORRUELLA, Circuit Judge.

A jury convicted Dianne Sutherland of one count of conspiracy to distribute cocaine and marijuana, and Alan Fini of three counts of distributing cocaine, one count of distributing marijuana, two counts of tax evasion, and the conspiracy count. Both appellants raise a myriad of issues as grounds for reversal of their convictions. Although worthy of discussion, we find that these appeals are ultimately without merit, and we affirm the convictions.

I.

BACKGROUND

The history of this case begins in the courts of the Commonwealth of Massachusetts. On July 18, 1986, Fini, Sutherland, and others were charged in Hampden County, Massachusetts Superior Court with several narcotics offenses, including trafficking in cocaine and unlawful distribution of marijuana. The indictments were the fruits of a lengthy

investigation conducted primarily by state law enforcement officers, with some participation by federal agents from the Internal Revenue Service (IRS) and the Drug Enforcement Administration (DEA). The investigation produced a number of incriminating tape recordings of conversations between the defendants and an informant, Gary Forish.

Under Massachusetts law, warrantless interception of oral and wire communications is prohibited absent consent of all the parties, except in two circumstances which do not apply here. Mass.Gen.L. ch. 272 § 99. The Massachusetts Supreme Judicial Court has held that, although not a violation of the federal Constitution, warrantless surveillance violates the right to privacy protected by the Massachusetts Declaration of Rights, Art. 14. *Commonwealth v. Blood,* 400 Mass. 61, 68-71, 507 N.E.2d 1029, 1032-35 (1987). For this reason, tape recordings obtained in violation of ch. 272, § 99, and testimony derived therefrom, cannot be used as substantive evidence in Massachusetts prosecutions. *Id.* at 77, 507 N.E.2d at 1038.

In the prosecution of Alan Fini, the Commonwealth conceded that the recordings were inadmissible in its case-in-chief. Before trial, however, the Commonwealth moved in limine for a determination that it would be allowed to use the tapes as impeachment evidence should Fini testify. The question was reported directly to the Supreme Judicial Court, which held that "the Commonwealth may not use the recorded conversations for impeachment purposes irrespective of whether the conversations dealt with collateral matters or directly with the crimes charged." *Commonwealth v. Fini,* 403 Mass. 567, 573, 531 N.E.2d 570, 574 (1988). Apparently this ruling made the prosecution less attractive: On September 5, 1989, the case was dismissed upon motion of the Commonwealth.

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On November 1, 1989, a federal grand jury returned an indictment against Sutherland, Fini, and a third defendant who was subsequently acquitted at trial. During the pre-trial phase, Sutherland moved to sever the tax counts against Fini from the rest of the case. Fini, joined by Sutherland, moved to suppress the tape recorded conversations on the theory that admitting the tapes in federal court, after they had been declared inadmissible in Massachusetts, violated due process. These motions were denied and the case proceeded to trial, resulting in the convictions appealed from here.

Sutherland and Fini raise several issues together, and each appellant also raises individual claims of error. We shall first address the common issues before proceeding to the individual arguments. Facts will be brought in as appropriate.

II.

DISCUSSION

A. *Admissibility of the tape recordings.*

Appellants contend that the tape recordings should have been suppressed because they were obtained by state law enforcement personnel in violation of Massachusetts law. We begin with the proposition that federal law governs federal prosecutions in federal court. *Elkins v. United States,* 364 U.S. 206, 223, 80 S.Ct. 1437, 1447, 4 L.Ed.2d 1669 (1960); *see also United States v. Little,* 753 F.2d 1420, 1434 (9th Cir. 1984) ("Evidence obtained in violation of neither the Constitution nor federal law is admissible in federal court proceedings *without regard to state law.")* (emphasis in original). This court has consistently adhered to this rule. *See United States v. Santana,* 895 F.2d 850, 853 (1st Cir. 1990); *United*

States v. Mitro, 880 F.2d 1480, 1485 n. 7 (1st Cir. 1989); *United States v. One Parcel of Real Property*, 873 F.2d 7, 8 (1st Cir. 1989), *cert. denied sub nom. Latraverse v. United States*, ____ U.S. ____, 110 S.Ct. 236, 107 L.Ed.2d 187 (1990); *United States v. Jorge*, 865 F.2d 6, 10 n. 2 (1st Cir.), *cert. denied*, 490 U.S. 1027, 109 S.Ct. 1762, 104 L.Ed.2d 198 (1989); *United States v. Quinones*, 758 F.2d 40, 43 (1st Cir. 1985). As the parties agree that the requirements of the federal wiretap statute, 18 U.S.C. § 2510 *et seq.*, were met in this case, appellants have a steep uphill climb to convince us to disregard this basic rule.

To support their position appellants point to our decisions in *United States v. Pratt*, 913 F.2d 982 (1st Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 681, 112 L.Ed.2d 673 (1991), and *United States v. Jarabek*, 726 F.2d 889 (1st Cir. 1984). These cases suggest the following possible exception to the general rule: If state law enforcement officers, acting without federal involvement and in knowing violation of state law, gather evidence which is inadmissible in state court but admissible in federal court, the federal court should not condone the use of such evidence because to do so would permit federal officials to "allow[ ] illegally seized evidence to be handed them on a 'silver platter.' " *Pratt*, 913 F.2d at 986 (quoting *United States v. Aiudi*, 835 F.2d 943, 946 (1st Cir. 1987), *cert. denied*, 485 U.S. 978, 108 S.Ct. 1273, 99 L.Ed.2d 484 (1988)); *see also Jarabek*, 726 F.2d at 900 n. 10.

In this case, appellants claim that the investigation culminating in their arrest was primarily a state affair. A state police officer headed the investigation, and state police conducted the briefings, the surveillance, and the tape recordings. Appellants characterize federal involvement in the case as minimal. Therefore, they maintain that the more restrictive state law should govern.

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We reject appellants' argument on both a factual and a legal basis. As to the facts, although it is clear from the record that the state played a leading role in the investigation, it was far from a one-man show. The DEA provided funds to the informant for the pruchase of drugs on at least two occasions. The original tape recordings were turned over to the DEA for duplication and safekeeping. DEA officers were involved at various times. United States Marshals seized automobiles belonging to Fini, under authority of DEA forfeiture laws. The IRS conducted a parallel investigation during the pendency of the state effort. Indeed, this latter fact brings the case very close to *Aiudi,* where we held that the existence of independent state and federal investigations justified the use of the state-gathered evidence in a federal proceeding, because the federal officer had authority to do lawfully exactly what the state officers had done unlawfully. *Aiudi,* 835 F.2d at 946. We could conclude simply that because the investigation in this case was not *purely* a state creature, it falls within the general rule that "the admissibility of evidence obtained during a joint federal-state investigation for use in a federal criminal trial is governed by federal law." *Pratt,* 913 F.2d at 987 (citing *Jarabek,* 726 F.2d at 900).[1] This rule applies even where, as here, the state initially sought to use the evidence in a state prosecution. *See Jarabek,* 726 F.2d at 896-97. Thus, we could limit our holding to the narrow facts of this case; however, we choose to go further.

More fundamentally and more broadly, we wish to curb speculation as to a "silver platter" exception stemming from our

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1. The Massachusetts wiretap statute itself exempts federal law enforcement officers from its provisions provided that they are "acting pursuant to authority of the laws of the United States and within the scope of their authority." Mass. Gen.L. ch. 272 § 99(D)(1)(c).

dicta in *Pratt* and *Jarabek*. In our view, the language in note 10 of *Jarabek* implies only that in an extreme case of flagrant abuse of the law by state officials, where federal officials seek to capitalize on that abuse, this court might choose to exercise its supervisory powers by excluding ill-gotten evidence. This pronouncement is not ground-breaking; it merely traces the contours of a well-established power inherent in the federal courts. *See Elkins,* 364 U.S. at 216, 80 S.Ct. at 1443-44. It certainly does not delineate an exception to the general rule that federal law governs in federal prosecutions. None of our cases has actually found circumstances supporting an exception, nor have other courts reached this result. *See Jarabek,* 726 F.2d at 900 ("We have found no federal case that has relied on state law in judging the admissibility of evidence of intercepted communications in any circumstances other than where the electronic surveillance was conducted pursuant to a state warrant or order.") We write here to clarify that, in this circuit, there is no such exception. We prefer this approach to forcing courts into intricate analytical maneuvers to escape a poorly conceived exception.

The Second Circuit has travelled a similar path in rejecting a "silver platter" exception. That court intimated, in *United States v. Sotomayor,* 592 F.2d 1219, 1225 (2d Cir.), *cert. denied sub nom. Crespo v. United States,* 442 U.S. 919, 99 S.Ct. 2842, 61 L.Ed. 2d 286 (1979), that such an exception might exist. Application of the supposed exception in *Sotomayor* was negated by the court's characterization of the state law at issue as merely procedural rather than affecting a fundamental right. *Id.* at 1225-26. In later cases the Second Circuit, and the district courts within that circuit, consistently refused to apply an exception,, either because of the procedural/fundamental distinction, or because of a finding that both federal and state officers had participated in the investigation. *See, e.g., United States v.*

Spadaccino, 800 F.2d 292, 296-97 (2d Cir. 1986); *United States v. Aiello*, 771 F.2d 621, 627 (2d Cir. 1985); *United States v. Lilla*, 699 F.2d 99, 102 n. 3 (2d Cir. 1983); *United States v. Regan*, 706 F.Supp. 1102, 1108 (S.D.N.Y. 1989); *United States v. Eyerman*, 660 F.Supp. 775, 780 (S.D.N.Y. 1987), *appeal dismissed*, 857 F.2d 1462 (2d Cir. 1987).

A different and much broader rationale supported the decision of the Second Circuit in *United States v. Pforzheimer*, 826 F.2d 200 (2d Cir. 1987), where the issue was one of state constitutional law and the investigation was entirely under the auspices of the state police. There the court allowed the evidence in a federal prosecution, stating that this result did not create any potential for abuse:

> A state prosecutor whose case relies on evidence that may be inadmissible in a state court trial has no power or authority to effect a prosecution in federal court. The initiation of a federal prosecution depends entirely on the discretion of the federal prosecutor.

Id. at 204. Following *Pforzheimer*, the District Court for the Southern District of New York has concluded that "[i]t is therefore unclear whether the Second Circuit still recognizes the *Sotomayor* rule." *Regan*, 706 F.Supp. at 1108. It does indeed appear that the Second Circuit has narrowed its rather expansive dicta in *Sotomayor*, as we now clarify our comments in *Jarabek* and *Pratt*.

In sum, we hold that in federal criminal prosecutions, the admissibility of wiretap evidence is a question of federal law.

As a second volley, appellants attempt to invoke the principle

of collateral estoppel to bind the federal court to the decision of the Massachusetts Supreme Judicial Court in *Commonwealth v. Fini,* 403 Mass. 567, 531 N.E.2d 570 (1988). In this circuit it is well established that a ruling in a state prosecution will collaterally estop the federal government only if federal authorities substantially controlled the state action or were virtually represented by the state court prosecutor. *United States v. Land at 5 Bell Rock Road, Freetown, Mass.,* 896 F.2d 605, 610 (1st Cir. 1990); *United States v. Bonilla Romero,* 836 F.2d 39, 43 (1st Cir. 1987), *cert. denied,* 488 U.S. 817, 109 S.Ct. 55, 102 L.Ed.2d 33 (1988). "Otherwise, a federal court is free to make its own determination." *Land at 5 Bell Rock Road,* 896 F.2d at 610.

Fini and Sutherland cite *Montana v. United States,* 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979), in support of their claim that the federal government should be precluded from relitigating the issue of the admissibility of the tapes. *Montana,* however, differs from this case in several respects. There, the federal government, although not a party, assumed control over the earlier state litigation by requiring the lawsuit to be filed, reviewing and approving the complaint, paying attorneys' fees and costs, directing the appeal, and submitting an amicus brief to the state supreme court, *Id.* at 155, 99 S.Ct. at 974-75. Based on those facts the Supreme Court found that "although not a party, the United States plainly had a sufficient 'laboring oar' in the conduct of state-court litigation to actuate principles of estoppel." *Id.* By contrast, in this case there is no evidence that the federal prosecutors played any role or had any direct influence in the state court suppression hearing. The federal government was not a party, nor in privity with a party, and

collateral estoppel is therefore inapplicable.[2]

B. *Sufficiency of the evidence.*

Count I of the indictment charged both Fini and Sutherland with conspiring to "distribute and possess with intent to distribute, a Schedule I Controlled Substance, namely marijuana, and a Schedule II Controlled Substance, namely, cocaine." The conspiracy charge was the only count against Sutherland. Most of the evidence at trial focused on cocaine, and neither appellant challenges the sufficiency of the evidence with regard to cocaine. Appellants do argue, however, that there was insufficient evidence to convict them for a *marijuana* conspiracy. As the indictment charged a single conspiracy to distribute both drugs, appellants maintain that insufficient evidence as to one of the drugs mandates acquittal on the entire count.

The issue here is the recurring problem of single/multiple conspiracy. *See Berger v. United States,* 295 U.S. 78, 81, 55 S.Ct. 629, 630, 79 L.Ed. 1314 (1935). The indictment charged a single conspiracy to distribute "marijuana and cocaine," but the proof at trial arguably demonstrated that there may have been two conspiracies—one to distribute marijuana and one to distribute cocaine—or, as appellants contend, that there was no conspiracy to distribute marijuana at all. Appellants claim that a variance

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2. We similarly find that the record is devoid of any evidence that the federal prosecution was vindictive. Fini's conclusory allegation does not suffice to meet his burden. *See United States v. Marrapese,* 826 F.2d 145, 147 (1st Cir.), *cert. denied,* 484 U.S. 944, 108 S.Ct. 331, 98 L.Ed.2d 358 (1987); *United States v. Bassford,* 812 F.2d 16, 20 (1st Cir.), *cert. denied,* 481 U.S. 1022, 107 S.Ct. 1909, 95 L.Ed.2d 514 (1987). Fini's allegation of bad faith forum shopping fares no better.

analysis, which focuses on discrepancies between indictment and proof, is inappropriate here, because the government waived its right to a variance analysis in failing to object to the charge as it went to the jury. We are not persuaded, and find instead that this case is controlled by our decision in *United States v. Glenn*, 828 F.2d 855 (1st Cir. 1987).

In *Glenn*, two defendants were convicted of conspiracy to import and possess marijuana and hashish, and actual possession of marijuana. This court found that the evidence proved not one but two separate conspiracies. One defendant, Glenn, had participated in the hashish conspiracy, and the other defendant, Benavides, had participated in the marijuana conspiracy, but neither defendant had conspired to import and possess both drugs. Only Glenn's conviction required reversal, however, because only he suffered significant prejudice from the variance. This prejudice stemmed from the judge's instruction to the jury that, if it found Glenn guilty of the conspiracy, it could also find him guilty of the substantive charges relating to the marijuana even though there was no evidence tying Glenn to the import or possession of marijuana.

Glenn provides the outline for our approach in variance cases:

> (1) Is the evidence sufficient to permit a jury to find the (express or tacit) agreement that the indictment charges? (2) If not, is it sufficient to permit a jury, under a proper set of instructions, to convict the defendant of a related, similar conspiracy? (3) If so, does the variance affect the defendant's substantial rights or does the difference between the charged conspiracy and the conspiracy proved amount to "harmless error?"

Glenn, 828 F.2d at 858; *see also Berger*, 295 U.S. at 82, 55 S.Ct. at 630 ("The true inquiry . . . is not whether there has been a variance in proof but whether there has been such a variance as to 'affect the substantial rights' of the accused."). In *Berger*, the Court noted two ways in which a defendant may be substantially prejudiced by a variance. He may receive inadequate notice of the charges against him and thus be taken by surprise at trial, or he may be twice subject to prosecution for the same offense. *Berger*, 295 U.S. at 82, 55 S.Ct. at 630-31. This court has identified a third type of harm known as "spillover": "the transference of guilt to an individual defendant involved in one conspiracy from evidence incriminating defendants in a conspiracy in which the particular defendant was not involved." *United States v. Thomas*, 895 F.2d 51, 56 and n. 7 (1st Cir. 1990) (quoting *United States v. Levine*, 569 F.2d 1175, 1177 (1st Cir.), *cert. denied*, 436 U.S. 928, 98 S.Ct. 2824, 56 L.Ed.2d 771 (1978)); *see also United States v. Drougas*, 748 F.2d 8, 18 (1st Cir. 1984); *United States v. Flaherty*, 668 F.2d 566, 580 (1st Cir. 1981). "Spillover" prejudice is a particular risk in a case such as this one, where considerably more evidence is presented against one defendant than against the others.

Applying the *Glenn* analysis to the present circumstances, we conclude that neither Sutherland nor Fini's conviction requires reversal. As to Fini, we need not go beyond the first step of the inquiry. The evidence, consisting of the testimony of informant Gary Forish, was sufficient to permit the jury to convict Fini of the conspiracy as charged. Forish testified that he had purchased marijuana from Fini on a number of occasions,, albeit "not very often" in comparison to the number of cocaine purchases. When Forish was arrested prior to turning informant, a bag of marijuana was found in his possession. He testified at trial that he had bought the bag of marijuana from Fini for $900 on credit, which was

the "normal" way he and Fini did business. Forish explained that he and Fini had an "understanding" that the next time Forish picked up a "product" he was to "pay off as much of the balance as possible." When queried as to the meaning of "product," Forish stated that it meant cocaine or marijuana. Forish also testified that he had intended to resell the bag of marijuana for profit. Leaving the credibility determination to the jury, as we must, we find that the evidence of marijuana transactions, taken with the ample evidence as to cocaine, was sufficient to convict Fini of conspiracy to distribute both drugs.

Sutherland's situation requires somewhat more analysis. Only one piece of Forish's testimony connected her with the marijuana conspiracy. Forish stated that she had been present when he purchased from Fini the marijuana later found in his possession. It is, of course, axiomatic that standing alone, neither "mere presence" nor a "single isolated act" can establish the existence of a conspiracy. *See, e.g., United States v. Aponte-Suarez,* 905 F.2d 483, 491 (1st Cir.), *cert. denied,* ____ U.S. ____, 111 S.Ct. 531, 112 L.Ed.2d 541 (1990); *United States v. DeLutis,* 722 F.2d 902, 905 (1st Cir. 1983). Based on this sole piece of evidence, therefore, a conviction for cocaine and marijuana conspiracy could not stand.

The second *Glenn* step asks if the defendant could have been convicted of a related similar conspiracy to that charged. Here the answer is clearly affirmative. The government introduced substantial evidence, in the form of live testimony and tape recordings that Sutherland was a participant with Fini in the conspiracy to distribute cocaine. The evidence showed, for example, that Sutherland had purchased a case of an agent used to dilute cocaine; that the responsibility for "cutting" the cocaine was hers; and that she had, on more than one occasion, accepted

money from cocaine purchases when Fini was unavailable. There is no doubt that sufficient evidence was introduced to convict Sutherland for a cocaine conspiracy, and indeed, she does not seriously contend otherwise.

That conclusion brings us to the final prong of the variance analysis: Did the variance between offense charged and proved affect the substantial rights of the accused? We find that it did not. Sutherland had notice of the nature of the charge, and there is no danger of a repeat prosecution for the same offense. There was no prejudicial spillover from the marijuana evidence, which was minor compared with the abundant evidence regarding cocaine. We also note that the district court instructed the jury in unmistakable terms that it must consider the evidence against each defendant separately. Sutherland was not subjected to an increased penalty as a result of the variance. Accordingly, the variance in this case amounted only to harmless error.

C. *Ineffective assistance of counsel.*

Sutherland and Fini each point to the conduct of their respective trial attorneys as ground for a new trial. Our reading of the record leads us to conclude that, at the least, these allegations are not meritless. Nevertheless, we decline to address the issue because it was not raised below by either appellant, whether during trial or in a post-trial motion. Determining the existence of ineffective assistance generally requires an "independent factual inquiry into the merits of the claim." *United States v. Caggiano,* 899 F.2d 99, 100 (1st Cir.), *abrogated on other grounds, Horton v. California,* ____ U.S. ____, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). "The proper route for such claims is through a collateral proceeding in district court pursuant to 28 U.S.C. § 2255 so proper factual determinations can be made." *Id.; see also United States*

v. Rodriguez-Cardona, 924 F.2d 1148, 1159 (1st Cir. 1991).

We have considered appellants' suggestion that the alleged ineffective assistance in this case is so apparent from the record that the normal and preferred procedure is unnecessary, *see Caggiano,* 899 F.2d at 100, but we disagree. It is true that the record manifests a possible conflict of interest on the part of Sutherland's attorney,[3] and a questionable trial strategy used by Fini's counsel. Nevertheless, it also appears that Sutherland may have waived the conflict of interest, *see United States v. Fahey,* 769 F.2d 829, 834-35 (1st Cir. 1985), and it is certainly apparent that the evidence against Fini was so substantial that an unusual defense strategy may have been appropriate.

Moreover, the evidence against both appellants may have been sufficient to overcome the harm of poor performance by counsel. In Sutherland's case, "when 'a defendant has voluntarily chosen to proceed' with a potential conflict 'it is fair, if [s]he later alleges ineffective assistance growing out of a conflict, to require that [she] demonstrate that a conflict of interest actually affected the adequacy of representation.' " *Fahey,* 769 F.2d at 835 (quoting *Cuyler v. Sullivan,* 446 U.S. 335, 353, 100 S.Ct. 1708, 1720, 64 L.Ed.2d 333 (1980) (Brennan, J., concurring)). As to Fini, a defendant alleging ineffective assistance must show not only that counsel was deficient but also that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). This court is simply not situated to make a trustworthy judgment on this issue, and we decline to attempt to do so.

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3. For the facts supporting the conflict of interest charge, see pages 776-777, [20a-23a], *infra.*

Appendix A

D. *Court's comment on defendants' right not to present evidence.*

After the government rested, the judge told the jury:

> After the Government rests its case, the Defendants have an option. They have a constitutional right to rest without offering any evidence, resting on the burden the Government has to prove its case beyond a reasonable doubt. Or they may go forward and offer evidence.

The judge then asked counsel for each defendant, in turn, "Do you wish to offer any evidence?" and each replied in the negative.

Both appellants now contend that this comment unnecessarily emphasized their decision not to offer evidence. It appears to us, however, that the court's comment was an entirely accurate statement of law and was neutral with regard to the decision not to present a defense. There was no error.

E. *Improper comments on Fini's silence.*

Fini wages a two-part attack against what he contends was improper comment on his failure to testify; Sutherland joins this part of the appeal because of what she terms its "prejudicial spillover effect" on her. First, the government's summary witness in the tax case against Fini, Gilbert George, testified that "based on the only discussion I have heard of possible sources of other income has been from drug activities." According to appellants, this comment, taken together with George's earlier statement that the IRS sometimes determines the amount of "cash on hand" simply by asking the individuals involved, amounted to unfair commment on Fini's silence. We conclude that this inference is

extremely thin. George simply testified to what he had heard in the courtroom and at no time suggested that Fini was under any obligation to provide information either before or during trial.

Of greater concern is the suggestion that the prosecutor erred when, at the beginning of his closing argument, he stated:

> When you go into the jury room, you can rely on your collective memory, and you also have a chance to observe the physical exhibits. Take a look at the marijuana purchased by Gary Forish from Alan Fini; three satchels of cocaine that were purchased by Gary Forish from Alan Fini.
>
> You get a chance to look at all the documents, and there are a number of them in this case. Those documents in large part verify the fact that Alan Fini made a lot of purchases that he couldn't explain.

The prosecution conceded in its brief and at oral argument that the last four words were ill-advised in light of previous decisions by this court. *See United States v. Skandier,* 758 F.2d 43, 45 (1st Cir. 1985); *United States v. Cox,* 752 F.2d 741, 745 (1st Cir. 1985). In *Cox,* we sketched the analysis appropriate in situations of possible prosecutorial misconduct:

> In deciding whether a new trial is required—either because prosecutorial misconduct likely affected a trial's outcome or to deter such misconduct in the future—we consider "the severity of the misconduct, whether it was deliberate or accidental, the likely effect of the curative instruction, and

the strength of the evidence against the appellants."

Cox, 752 F.2d at 745 (quoting *United States v. Capone*, 683 F.2d 582, 586 (1st Cir. 1982)).

We characterize the severity of the misconduct here as minimal. Apparently Fini's attorney did not find it so severe as to merit an objection. In the context of the closing argument, moreover, the prosecutor was attempting to imply that Fini's reported income was insufficient to cover the expensive purchases he had made; and in the context of tax investigations, authorities often inquire of a taxpayer about sources of income. Given all these circumstances, we do not believe that the intent of the prosecutor was to draw attention to Fini's failure to testify at trial. These facts also lead us to conclude that the statement was inadvertent rather than deliberate. Although the trial judge did not deliver an immediate curative instruction (none was requested by the defense), he did properly instruct the jury that the defendants were under no obligation to call any witnesses or produce any evidence. Finally, the evidence against Fini especially, and Sutherland as well, was substantial. Therefore, although the prosecutor's comment was improper, it was harmless and does not warrant a new trial.

F. Improper vouching by the prosecutor.

In his opening statement, the prosecutor said that Gary Forish:

> will tell you that by testifying for the Government in this case, he hopes to get a break from the State Courts. So he will be honest with you and he will explain to you that he has every incentive to

> cooperate with the Government in his testimony in this case.

On appeal, Fini and Sutherland assert that the prosecutor's remark amounted to improper vouching for the credibility of the government's witness. We disagree. The prosecutor did not put the prestige of the government behind the witness or indicate that extrinsic evidence supported the witness. *See United States v. Martin*, 815 F.2d 818, 823 (1st Cir.), *cert. denied*, 484 U.S. 825, 108 S.Ct. 89, 98 L.Ed.2d 51 (1987); *compare United States v. Simtob*, 901 F.2d 799, 805 (9th Cir.1990). It appears from the context of the remark that the prosecutor simply pointed out that Forish would disclose the terms of his plea agreement. Informing the jury of the existence of a plea agreement is not error. *Martin*, 815 F.2d at 821. And the phrase "he will be honest with you," while literally constituting vouching, "was the sort of borderline lapse which, at most, amounted to harmless error." *Id.* at 823.

G. Failure to make Petrozziello rulings.

Appellants suggest that the trial court erred in failing to make rulings required by *United States v. Petrozziello*, 548 F.2d 20 (1st Cir. 1977). *Petrozziello* states that at the close of evidence a trial court should make a finding regarding the existence of a conspiracy and the admissibility of contested coconspirator hearsay statements. *Petrozziello*, 548 F.2d at 23; *see also United States v. Ciampaglia*, 628 F.2d 632, 637-38 (1st Cir.), *cert. denied*, 449 U.S. 9546, 101 S.Ct. 365, 66 L.Ed.2d 221 and 449 U.S. 1038, 101 S. Ct. 618, 66 L.Ed.2d 501 (1980).

There was no need for the court to make a *Petrozziello* finding in this case, and none was requested by the defense, because none of the defendants challenged the admissibility of coconspirator

hearsay. In a similar situation this court stated: "Without a proper objection to the statements introduced by the government, the court is not required to follow the *Ciampaglia* procedure or make a *Petrozziello* finding." *United States v. Machor*, 879 F.2d 945, 950 (1st Cir. 1989), *cert. denied*, ____U.S.____, 110 S.Ct. 1138, 107 L.Ed.2d 1043 and ____U.S.____, 110 S.Ct. 1167, 107 L.Ed.2d 1070 (1990) (citations omitted). Accordingly, the trial court had no obligation to make a *Petrozziello* finding.

H. Right to confrontation and exculpatory evidence.

Fini makes a several-pronged attack on the conduct of the government and the court below. He claims that the government failed to disclose Forish's testimony before a 1983 federal grand jury. Further, he alleges that the trial court improperly precluded cross-examination of government witnesses Gary Forish and Peter Gerard. Finally, he contends that the court erred in preventing the defense from calling DEA Special Agent Edward O'Brien to impeach Forish. As a result of these alleged errors, Fini argues that his constitutional rights to confront the witnesses against him and to be provided with exculpatory evidence were violated. Sutherland joins in the final part of this argument, the desired impeachment of Forish by Agent O'Brien. Some background is necessary for an evaluation of these issues.

Fini's attorney learned just before trial that Forish may have testified before a federal grand jury in 1983, and wished to make this testimony part of cross-examination. The grand jury minutes have never been produced, and the government was unable to determine if Forish had in fact so testified. To resolve the issue, the trial cort held a voir dire in which it asked Forish whether he remembered testifying before the grand jury. Forish said that he did not remember doing so, but he admitted that he had been

previously questioned about narcotics activity in western Massachusetts and had failed to mention Fini at that time because he had not been specifically asked about Fini. The court ruled the topic of prior grand jury testimony out of bounds. Fini's attorney did cross-examine Forish about his admitted earlier failure to implicate Fini.

In our view, the record supports the government's contention that it was never established that Forish had actually testified before a grand jury in 1983. Thus, there was no constitutional violation arising from the government's "failure" to produce the minutes of the grand jury testimony. Moreover, Forish's answers to the court's voir dire gave defense counsel adequate opportunity to impeach Forish on cross-examination. There was no error.

The cross-examination of Peter Gerard was limited by circumstances related to the conflict of interest which Sutherland claims constituted ineffective assistance by her counsel. Gerard had rented property to Fini which Fini used as a "safe house" for the storage of cocaine and cash. Sutherland's trial counsel represented Gerard in a civil forfeiture proceeding concerning this property and related to the facts of this case.[4] Prior to Gerard's testimony, Sutherland's attorney asked the court to accept a stipulation between the government and him that there would be no mention on cross-examination that he was Gerard's attorney.

During cross-examination of Gerard by Fini's counsel, the subject of the civil forfeiture proceeding was raised. Following objections from the government and Sutherland's counsel, the court cut off cross-examination on the subject. Fini now argues

---

4. This potential conflict of interest was disclosed to Sutherland and to the court below, and all agreed that there would not be an actual conflict.

that he was denied the opportunity to cross-examine Gerard on the subject of bias, based on Gerard's hope of receiving favorable treatment from the government in exchange for his testimony.

The problem with this argument is that Fini has demonstrated absolutely no basis for suspecting bias other than a conclusory allegation. There was in fact no agreement of any kind between the government and Gerard. Therefore, the premise of Fini's argument is not supported by the record.

The final prong of attack is directed against the trial court's purported ruling precluding the defense from calling DEA Agent Edward O'Brien to the stand. Agent O'Brien had been active in a drug investigation involving Gary Forish in 1983 (it is this investigation that was alleged by the defense to have led to Forish's earlier testimony before a grand jury), and he was also apparently a participant in at least in the early stages of the investigation in this case. At the time of Fini and Sutherland's trial, however, Agent O'Brien had become embroiled in legal difficulties of his own. Prior to trial the government filed a motion *in limine* to exclude any mention of Agent O'Brien at the trial. This motion was allowed.

During trial, when the subject of Forish's possible prior grand jury testimony was raised, defense counsel suggested that Agent O'Brien might be brought in to testify on that issue. The court was reluctant to pursue that course, stating that "Agent O'Brien is so tied up in his own mess, he wouldn't remember what happened two days ago, never mind anything in 1983." Later that day during colloquy with the court, Michael Jennings, attorney for the acquitted co-defendant, stated his intention to subpoena O'Brien. The following dialogue took place:

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> The Court: If there is a motion filed to quash, I will allow it. I want to advise you.
>
> Mr. Jennings: It's my understanding that the Motion in Limine instructed us not to inquire into anything to do with Mr. O'Brien's current legal problems. I have no intention of doing that. I'm calling him as a witness to impeach and contradict something one of the Government witnesses said. I think I fully have the right to do that.
>
> The Court: Well, file your motion and see what I do about it.
>
> Mr. Jennings: Well, it would be my intention just to subpoena him. I'm going to subpoena him through the Marshals.
>
> The Court: File it and I'll see if I get any response from the Government. I will act upon it.

After further discussion among the court, all defense counsel, and the prosecutor, the court stated to Jennings:

> I think you have plenty in which to try to impeach credibility if you wish to use it. I don't think one thing more is going to add anything to what you already have, but I will allow you to go forward, if you can do so, if you want to file some sort of subpoena, and we'll see if the Government objects, and I will take it from there.

That was the last mention of a subpoena for Agent O'Brien.

Appendix A

It was never pursued by any of the defendants. Now, Fini and Sutherland contend that the trial court prevented them from presenting impeachment material through the testimony of Agent O'Brien. This contention cannot stand. There is no indication that O'Brien had any impeachment evidence to offer. Moreover, neither appellant chose to follow this avenue of impeachment at trial. No doubt the trial judge indicated that he disfavored the tactic. Nevertheless, his final words on the subject constituted a plain invitation to defense counsel to request the subpoena. Having failed to do so, they cannot now lay that failure at the court's door.

I. Failure to instruct on defense theory.

The court instructed the jury as follows:

> Two persons may be found to have conspired even though the evidence of one's role is greater than the evidence of another's role.
>
> However, while you may find that a single act may be sufficient to draw a defendant within the ambit of the conspiracy, you would have to determine that the single act was specifically intended to further the objective of the conspiracy before you could convict the defendant for that single act.

Sutherland's counsel objected to this instruction, which differed somewhat from that requested by the defense, and to the court's refusal to give an instruction on the distinction between aiding and abetting and conspiracy. These objections are now raised on appeal by Sutherland alone.

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Sutherland's theory in the case was that while the evidence may have shown that she assisted Fini in some discrete criminal acts, she was not guilty of a larger conspiracy. The evidence, however, does not bear out this theory. Rather, the facts show that Sutherland acted as Fini's assistant in a lengthy and profitable drug business. Therefore it was not error to refuse to give the requested instructions.

J. Denial of severance motion.

Sutherland moved before trial to sever Fini's two tax evasion counts from the parties' joint trial on the drug charges. She now claims that the refusal to sever was reversible error. We disagree.

Rule 8(b) of the Federal Rules of Criminal Procedure states the standard for joinder of defendants:

> *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions, constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed.R.Crim.P. 8(b). The requirements of Rule 8(b) were satisfied by the joinder here. The acts and transactions that were relevant to the drug offenses were also relevant to the tax evasion offenses. The government used the expenditures method of proof for the tax counts, which involves demonstrating that a defendant made purchases exceeding his reported income. The expenditures method requires the government to show a likely source of income

financing the excessive purchases. *Holland v. United States,* 348 U.S. 121, 138, 75 S.Ct. 127, 136-37, 99 L.Ed. 150 (1954). In this case the government proved that the likely source of income was drug distribution. If the tax evasion counts had been severed from the drug trial, the drug evidence would have been presented in the tax trial to prove the likely source of income.

Furthermore, the same tape recordings were used by the government to prove both the drug and the tax offenses. Not only were drug transactions captured on these recordings; they also contained conversations about the many expensive motor vehicles purchased by Fini. As many of these purchases were made through nominees, the tapes formed an essential link between the purchases and Fini. Because of this overlap in evidence, joinder was proper. *See United States v. Doherty,* 867 F.2d 47, 63 (1st Cir.), *cert. denied,* ____ U.S. ____, 109 S.Ct. 3243, 106 L.Ed.2d 590 (1989) (joinder proper where common factual questions allow the jury to draw consistent conclusion regarding facts relevant to separate counts); *United States v. Arruda,* 715 F.2d 671, 678-79 (1st Cir. 1983) (joinder proper where facts and legal issues overlap sufficiently so that the practical benefit of a consolidated trial outweighs each defendant's interest in having guilt considered individually).

Because joinder was proper under Rule 8(b), the denial of Sutherland's motion is error only if it constituted "an abuse of discretion which deprived [her] . . . of a fair trial and resulted in a possible miscarriage of justice." *United States v. Santiago Barbosa,* 666 F.2d 704, 708 (1st Cir. 1981); Fed.R.Crim.P. 14. Sutherland asserts that evidence of Fini's tax evasion was prejudicial to her in that it allowed the jury to infer that Sutherland had a criminal disposition and that she had received financial benefit from the unreported drug proceeds. She also complains

that some of the evidence implicated her directly, and she challenges the failure of the court to give a limiting instruction.

The record, however, does not show unfair prejudice. None of the tax witnesses directly implicated Sutherland. To the extent that Sutherland was implicated it was through her own tape-recorded statement ("they found out we own some things we shouldn't own") or through evidence to which her attorney stipulated admissibility (see *infra* at 779-780).

Finally, we note that Sutherland's trial counsel failed to request the court to instruct the jury that it should consider the tax evasion evidence only against Fini. It may be true, as Sutherland now asserts in her brief, that this failure evinces substandard performances by trial counsel. As we discussed above, however, claims of ineffective assistance are best raised through a collateral proceeding. As we have found no undue prejudice, and thus no plain error, we do not see a reason here to depart from our established procedure not to consider issues raised for the first time on appeal. At any rate, the court below did give at least a partial limiting instruction when it told the jury to "give separate, personal consideration to the case of each individual defendant."

K. *Admission of testimony regarding bank checks.*

All defendants and the government stipulated before trial to the admissibility of certain bank deposit items under Federal Rule of Evidence 803(6), which is the exception to the hearsay rule for records of regularly conducted activity. The stipulation provided that "[a]ny party shall be entitled to call any witness to explain or testify concerning any document" covered by the stipulation. Among the items deposited were bank checks bearing

the name of Dianne Sutherland as payee. Although the primary evidentiary purpose of the bank checks was to prove the tax evasion counts against Fini, they may have also served to support the conspiracy case against Sutherland.

At trial, the government introduced these exhibits through the testimony of two retail merchants who testified that the checks had been used to pay for expensive motor vehicles purchased by Alan Fini. The witnesses went further and stated, in answer to a question from the prosecuting attorney, that Dianne Sutherland's name appeared on the checks. On the first of the six occasions on which this testimony occurred, Sutherland's attorney objected. Fini's counsel reminded Sutherland's counsel that they had stipulated to the checks, and the court directed the witness to answer. Sutherland now contends that this testimony was hearsay and inadmissible to prove that Dianne Sutherland was the purchaser of the checks.

There was no error, due to the simple fact that the checks themselves were properly in evidence and had been stipulated to by all parties. Sutherland's name appeared plainly on the checks. This evidence does not provide a basis for reversal of the conviction.

L. *Invasion of jury's province.*

As a final challenge, Fini contends that the trial court erred in permitting testimony from Gilbert George, the government's summary witness in the tax case. As we have stated, the government used the expenditures method to prove additional tax due and owing, an element of the charge that Fini willfully evaded income tax. The expenditures method requires that the government: (1) demonstrate that the appellant's expenditures did

not result from cash on hand, or the conversion of assets on hand at the beginning of the period; (2) establish through independent evidence that the expenditures charged to the appellant were non-deductible; (3) establish a likely source of income from which the expenditures sprang, or negate non-taxable sources of income; and (4) investigate all relevant leads reasonably susceptible to being checked. *Taglianetti v. United States,* 398 F.2d 558, 562 (1st Cir. 1968), *aff'd,* 394 U.S. 316, 89 S.Ct. 1099, 22 L.Ed.2d 302 (1969).

The government offered Gilbert George as a summary witness to calculate income taxes due. George applied the expenditures method of proof to show the income tax due for each year of the tax evasion charge. Fini complains that George essentially gave his expert opinion that Fini was guilty of not only the tax evasion counts but the drug counts as well. For example, when asked from where he believed Fini obtained the funds to make the purchases, George stated:

> Based on the only discussion I have heard of possible sources of other income has been from drug acttivities. As part of the answer I would therefore say in this case these excess expenditures were derived from the net profits from the sale of illegal drugs.

Fini summarizes George's testimony as drawing the following inferences for the jury: Fini spent a lot of money; he didn't earn it as a farmer; therefore he earned it through his drug activity.

Fini's premise demonstrates a misconception of the expenditures method of proof. Most of George's testimony was directed toward showing that the expenditures were made from current income, as opposed to savings or the conversion of other

assets. This testimony was essential to meet the first of the *Taglianetti* requirements. The third requirement is that the government must establish a likely source of income. To satisfy this step George testified that, based on the evidence already presented at the trial, the likely source of income in Fini's case was the sale of controlled substances. *See United States v. Sorrentino*, 726 F.2d 876, 881 (1st Cir. 1984). We find that the government's use of the summary witness was not improper.

III.

CONCLUSION

In spite of the collection of errors asserted by Sutherland and Fini as grounds for either reversal of their convictions or at the least a new trial, a review of the record has left this court with the firm impression that given the weight of the evidence, both appellants received a fair trial and were fairly convicted. For this reason, and for the reasons discussed above, the convictions are *affirmed*.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT IN *UNITED STATES v. ALAN W. FINI*

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case Number: CR 89-30027-F(01)

UNITED STATES OF AMERICA

V.

ALAN W. FINI
2050 East Mountain Rd.
Westfield, MA 01085
013-42-3931

Joel Rosenthal, Esq.
Attorney for Defendant

JUDGMENT IN A CRIMINAL CASE

* * *

THERE WAS A: verdict of guilty as to counts 1-7.

* * *

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: conspiracy to distribute and possess with intent to distribute marihuana and cocaine, in violation of 21 USC 841(a)(1), 846; of distribution of cocaine and marihuana, in violation of 21 USC 841(a)(1); of income tax evasion, in violation of 26 USC 7201.

IT IS THE JUDGMENT OF THIS COURT THAT: on Count

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1, the defendant be committed in the custody of the Attorney General for a period of Twelve(12) years. Counts 2,4,5 the Court orders committment into the custody of the Attorney General of Twelve(12) years on each count and a special parole term of three(3) years on each count, the sentence on these counts to be served concurrently with the sentence in Count 1. Counts 3,6,7 the Court orders committment to the Attorney General for a period of Five(5) years on each count and a special parole term two(2) years on count 3, the sentence in these counts to be served concurrent with the sentences in counts 1,2,4,5.

Execution of sentence is stayed until August 9, 1990 @ 2:00 PM when the defendant will report directly to the federal institution where the sentence will be served.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

* * *

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $300 pursuant to Tile 18, U.S.C., Section 3013 for count(s) 1-5, 7 as follows: within two(2) weeks.

* * *

Date of Imposition of Sentence: July 19, 1990

s/ Frank H. Freedman
Frank H. Freedman, Chief U.S. District Judge

Date: July 19, 1990

APPENDIX C — DECISION OF THE UNITED STATES DISTRICT COURT DENYING DEFENDANT'S MOTION TO EXCLUDE EVIDENCE

THE COURT: Be seated. Gentlemen, you want to discuss something?

MR. ROSENTHAL: Your Honor, there are two primary matters. One that affects me more directly I guess than the others. And another one that affects primarily Mr. Kelly and Mr. Jennings.

With respect to me, so to give you a little background very briefly, the case came originally from the State investigation, in which there were undercover tapes made which Mr. Kinder plans to play beginning this afternoon or tomorrow. These tapes were made in violation of laws of the State of Massachusetts; so found to be under the prevailing case law at the time, or at least conceded to be by the State Attorney and the Supreme Judicial Court prohibited them.

THE COURT: Federal law and State law differ on that.

MR. ROSENTHAL: I understand, and rather than submit extensive memos to your Honor and rather than stand up each time a tape is played, I'm simply making — I would like to have a continuing objection to the tapes on due process grounds, on the basis that this was a State court — State investigation for State purposes, which has now been taken over by the Federal authorities for purposes of prosecution in Federal Court, and it is my belief that that offends the due process laws of the Constitution.

That's my objection and with the Court's permission, we will not stand to object each time the tapes are played.

THE COURT: Very well.

MR. KELLY: On behalf of our clients, we all join in that, on behalf of the co-defendants Fini and Sutherland, your Honor.

THE COURT: I don't know if your objection is going to go very far, but you have a right to object.

MR. ROSENTHAL: I understand that problem, your Honor.

THE COURT: All right. Bring the jury in.

* * *

APPENDIX D — OPINION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS IN *COMMONWEALTH v. ALAN FINI*, 403 MASS. 567 (1988)

COMMONWEALTH *vs.* ALAN FINI.

Hampden. May 3, 1988. — December 14, 1988.

Present: HENNESSEY, C.J., WILKINS, LIACOS, ABRAMS, NOLAN, LYNCH, & O'CONNOR, JJ.

Eavesdropping. Search and Seizure, Electronic surveillance, Expectation of privacy. *Constitutional Law*, Search and seizure, Privacy. *Privacy. Evidence*, Impeachment of witness. *Witness*, Impeachment.

In a criminal case, tape recordings of conversations that took place in and around the defendant's home between the defendant and an informant, obtained through warrantless electronic surveillance in violation of the defendant's rights under art. 14 of the Massachusetts Declaration of Rights, were held not admissible to impeach the defendant's testimony either directly with respect to the crimes charged or with respect to collateral matters. [569-574] NOLAN, J., dissenting, with whom LYNCH, J., joined.

INDICTMENTS found and returned in the Superior Court Department on July 18, 1986.

A pretrial motion was heard by *John F. Murphy, Jr.*, J., and questions of law were reported by him to the Appeals Court. The Supreme Judicial Court transferred the case on its own initiative.

Joel N. Rosenthal of Florida (*William J. O'Grady* with him) for the defendant.

Charles E. Dolan, Assistant District Attorney, for the Commonwealth.

O'CONNOR, J. The defendant is charged with several drug offenses, including trafficking in cocaine, unlawful distribution of cocaine, and unlawful distribution of marihuana. Before trial, the Commonwealth moved in limine for a determination that certain tape recordings of conversations between the defendant and an informant would be admissible to impeach the defendant's testimony. The Commonwealth conceded, and now concedes, that the transmissions and recordings violated

the defendant's rights under art. 14 of the Massachusetts Declaration of Rights, and that the recordings would be inadmissible in the Commonwealth's case-in-chief.

The judge found that the conversations took place "in or around the home of the defendant." On the occasion of each conversation, unbeknownst to the defendant, the informant had been equipped with an electronic transmitting device, and the transmitted conversation was recorded by police officers. The tapes include conversations during which the defendant sold cocaine to the informant, as well as statements by the defendant concerning collateral matters, that is, matters other than those for which the defendant is under indictment but which nevertheless might impeach his testimony.

The judge ruled that the tapes would be admissible for impeachment purposes. However, pursuant to Mass. R. Crim. P. 34, 378 Mass. 905 (1979), he reported the case to the Appeals Court to present the following questions: "(1) Did the Court rule correctly in allowing the Commonwealth to use the recorded conversations with the defendant involving collateral matters for impeachment purposes, after an appropriate voir dire? (2) Did the Court rule correctly in allowing the Commonwealth to use the recorded conversations with the defendant which dealt directly with the crime charged, for impeachment purposes, after an appropriate voir dire?" We transferred the case to this court on our own initiative. We answer the reported questions, "No; the Commonwealth may not use the recorded conversations for impeachment purposes irrespective of whether the conversations dealt with collateral matters or directly with the crimes charged."

Warrantless electronic surveillance of conversations with the consent of just one of the parties does not violate the Constitution of the United States. *United States* v. *White*, 401 U.S. 745, 751 (1971). However, such surveillance, at least of conversations occurring in private homes, in the absence of evidence that the participants intended the contents to be broadcast, does violate art. 14 of the Massachusetts Declaration of Rights.[1]

[1] The Commonwealth makes no contention that a distinction should be made between conversations that took place inside the defendant's home and those that occurred on the defendant's premises but outside the house.

Commonwealth v. *Blood*, 400 Mass. 61, 68-71 (1987). Furthermore, because such surveillance violates art. 14, the tapes and any testimony derived from them or from the transmissions is inadmissible in the Commonwealth's case-in-chief. *Id.* at 77.[2]

The sole issue in this case is whether, if the defendant should testify, the Commonwealth may introduce relevant portions of the tapes to impeach his testimony. The Supreme Court held in *Harris* v. *New York*, 401 U.S. 222, 224-226 (1971), that a defendant's statements made to the police without coercion, but elicited in violation of the safeguards of Fifth Amendment rights mandated by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), may nevertheless be admitted to impeach the defendant's testimony. *Harris* holds that it is immaterial whether the impeachment relates to collateral matters or to matters bearing more directly on the crimes charged. *Id.* at 225. The court reasoned that "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief," *id.* at 225, and that "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Id.* at 226.

In *Oregon* v. *Hass*, 420 U.S. 714 (1975), after a police officer had given the defendant the *Miranda* warnings, the defendant admitted to the officer that he had stolen two bicycles. The defendant and the officer then departed in a cruiser for the place where the defendant had left one of the bicycles. En route, the defendant stated that he would like to telephone his attorney. The officer replied that he could do so after their return to the station. Thereafter, the defendant pointed out a place where the bicycle was found. At trial, the defendant's statements after his request for counsel were admitted for impeachment purposes. The Oregon Court of Appeals reversed the defendant's conviction and the Supreme Court of Oregon affirmed the Court of Appeals. Relying on *Harris* v. *New York*, *supra*, the United States Supreme Court reversed the

[2] The informant himself may testify concerning the conversations in which he took part because that testimony would not be the fruit of a constitutional violation. *Commonwealth* v. *Blood*, *supra* at 78.

Supreme Court of Oregon. *Harris* had involved defective *Miranda* warnings, a violation of a prophylactic rule. *Hass* involved a failure to afford a defendant his full constitutional right to counsel. The Court in *Hass* saw "no valid distinction" between the two situations, *id.* at 722, and declared that "the balance [between the value of deterrence and the value of impeachment] was struck in *Harris*, and [the Court was] not disposed to change it." *Id.* at 723. The Court further observed: "If, in a given case, the officer's conduct amounts to abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness." *Id.*

Subsequently, in *United States* v. *Havens*, 446 U.S. 620, 626-627 (1980), the Supreme Court followed its reasoning in *Harris* and *Hass*, and concluded that evidence inadmissible in the government's case-in-chief because obtained as a result of a search and seizure in violation of the Fourth Amendment is nevertheless admissible to impeach the defendant's testimony. The Court reaffirmed its position that the "incremental furthering" of the objectives of the exclusionary rules by forbidding impeachment by means of evidence unlawfully obtained was insufficient to "permit or require that false testimony go unchallenged." *Id.* at 627.

Of course, this court is free to hold that art. 14 of the Massachusetts Declaration of Rights provides greater protection to defendants than is provided by the United States Constitution as interpreted by the Supreme Court. *Commonwealth* v. *Harris*, 364 Mass. 236, 238 (1973). Until now, however, we have not held that evidence unlawfully obtained is unavailable to the Commonwealth to impeach a defendant's testimony, although we have not foreclosed that possibility in an appropriate case, and we have not been required to consider the question in the context of a case involving, as this one does, an unreasonable search and seizure in violation of art. 14.

Commonwealth v. *Harris*, *supra*, like *Harris* v. *New York*, *supra*, involved the question of admissibility for impeachment purposes of a defendant's uncoerced statement made to the police without compliance with the safeguards required by

Miranda v. *Arizona*, *supra*. We followed *Harris* v. *New York*, and held the evidence admissible as to the defendant's credibility. *Id.* at 239-240. We noted that "[t]he impeaching evidence in [that] case [did] not tend to prove any element of the crime charged," that is, it was only collateral, that "there was no real danger that the statements in issue would be used to prove the truth of the matter stated by the defendant," and that that "case would be a peculiarly unattractive vehicle for a ruling contrary to *Harris* v. *New York*." *Id.* at 240.

In *Commonwealth* v. *Mahnke*, 368 Mass. 662 (1975), cert. denied, 425 U.S. 959 (1976), the police obtained an incriminating statement from the defendant. Before obtaining the statement, the police knew, but did not inform the defendant, that his lawyer had been trying to speak to a police officer who had been significantly involved in the investigation of the crime with which the defendant was charged. Also, the police did not inform the lawyer that a custodial interrogation of his client was in progress. We held that the trial judge had properly ruled that the statement would be admissible to impeach the defendant if he were to testify. We were "not persuaded that factual distinctions between [that] case and *Harris* and *Hass* [were] sufficient to shift the balance struck in the two Supreme Court cases between impeachment of perjurious testimony and deterrence of improper police conduct." *Id.* at 696. We observed that the police had given the defendant the Miranda warnings, that the defendant was aware that his parents had engaged an attorney to represent him, and that the defendant could have halted the inquiry at any time and requested his attorney. *Id.* at 697. Thus, in *Mahnke*, as well as in *Commonwealth* v. *Harris*, *supra*, in arriving at a proper balance between the State's interest in impeachment and its interest in deterrence of police misconduct, we focused on the kind of unconstitutional intrusion that had occurred as well as on the likely impact on the defendant of the evidence obtained thereby. In neither case did we announce that evidence obtained as a result of constitutional violation is always admissible to impeach the defendant's testimony, nor did we announce an intention to limit art. 14's protection to that provided by the United States Constitution as interpreted by the United States Supreme Court.

Appendix D

One other case decided by this court requires at least brief discussion. *Commonwealth* v. *Domaingue*, 397 Mass. 693 (1986), involved indictments for incest, forcible rape, and statutory rape. The trial judge ruled that a warrantless electronic recording of a conversation at a restaurant between the defendant and the complainant, of which the defendant was unaware, was inadmissible in the Commonwealth's case-in-chief because it violated G. L. c. 272, § 99 (1986 ed.), but was admissible to impeach the defendant if he took the stand. The defendant testified, and on cross-examination the prosecutor asked him whether he had discussed with the complainant the possibility that she had become pregnant by him. The defendant answered, "[N]o." The prosecutor then showed him a transcript of the taped conversation, and asked him if that refreshed his recollection. The defendant said, "[N]o." The transcript was not introduced in evidence or shown to the jury. *Id.* at 702.

"Assuming, but not deciding, that the judge was correct in his ruling that the taped conversation must be excluded in the first instance," we said in *Domaingue*, at 702, "there was no error in allowing this line of questioning. . . . A witness may be impeached on cross-examination by reference to prior inconsistent statements which are not admissible substantively. See *Commonwealth* v. *Harris*, 364 Mass. 236, 238-240 (1973), citing *Harris* v. *New York*, 401 U.S. 222, 224 (1971) (statements elicited in violation of *Miranda* safeguards may be used for impeachment if voluntary and sufficiently trustworthy)." We receive little help in the present case from our decision in *Domaingue* because, in that case, the tape was not admitted in evidence and therefore the discussion about it was dictum, and also because the taped discussion did not take place at a private home as it did here and in the later case of *Commonwealth* v. *Blood*, 400 Mass. 61 (1987). There was no suggestion in *Domaingue* that the transmission and recording of the conversation without the defendant's consent violated art. 14 or any other constitutional right.

In arriving at our conclusion in *Commonwealth* v. *Blood*, *supra*, that surreptitious warrantless electronic transmission and recording of conversational interchange in a private home

violate art. 14, and that no evidence derived therefrom may be admitted in the Commonwealth's case-in-chief, we reasoned that "it is not just the right to a silent, solitary autonomy [of the thoughts and emotions] which is threatened by electronic surveillance: It is the right to bring thoughts and emotions forth from the self in company with others doing likewise, the right to be known to others and to know them, and thus to be whole as a free member of a free society." *Id.* at 69. "The instruments of electronic eavesdropping are peculiarly adapted to search our thoughts and emotions. Thus, these devices are peculiarly valuable to those charged with policing crimes . . . . But, because the peculiar virtues of these techniques are ones which threaten the privacy of our most cherished possessions, our thoughts and emotions, these techniques are peculiarly intrusive upon that sense of personal security which art. 14 commands us to protect." *Id.* at 70-71.

Given the magnitude of the unconstitutional intrusion accomplished by electronic eavesdropping in and about a private home, such as took place in this case, we conclude that half measures of deterrence are not enough. Surely, if we accept the validity of the premise that the exclusion from the government's case-in-chief of evidence obtained by unconstitutional means tends to deter that misconduct, a premise which this court has repeatedly accepted, see *Commonwealth* v. *Bishop*, 402 Mass. 449, 451 (1988); *Commonwealth* v. *Blood*, *supra* at 77; *Commonwealth* v. *Ford*, 394 Mass. 421, 426 (1985), it is also reasonable to conclude that the exclusion of such evidence for all purposes will act as a still further deterrent. Such a rule would tend to discourage the gathering of such evidence based on the hope that it will reach the jury in one way if not in another. Therefore, we answer the reported questions, "No; the Commonwealth may not use the recorded conversations for impeachment purposes irrespective of whether the conversations dealt with collateral matters or directly with the crimes charged."[3] Of course, as in *Commonwealth* v.

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[3]The rule adopted today applies to the defendant in this case and to the defendants in all cases now pending on direct appeal where the record is

Blood, supra, the informant himself may testify to the conversations. See note 2, *supra*.

The case is remanded to the Superior Court for further proceedings.

So ordered.

NOLAN, J. (dissenting, with whom Lynch, J., joins). What is so unreasonable about permitting the Commonwealth to confront the witness with prior contradictory statements to impeach credibility though such statements may not be introduced by the Commonwealth in its case-in-chief? A witness should not be made comfortable by the knowledge that he can say what he wants under oath regardless of its falsity without running the risk of impeachment. This is a none too subtle encouragement of perjury.

For this reason and for reasons expressed in *Commonwealth* v. *Blood*, 400 Mass. 61, 78-81 (1987) (Nolan, J., dissenting), I dissent.

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adequate to raise the issue. *Commonwealth* v. *Blood, supra* at 77 n.18, and cases cited.